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Honorable Lonny R. Suko

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

CARL H. PLUMB,

Plaintiffs,

vs.

BARCLAYS BANK DELAWARE, et
al,

Defendants.

Case No.: 2:11-CV-03090-LRS

DEFENDANT FIRSTSOURCE
ADVANTAGE, LLC'S
MEMORANDUM IN SUPPORT OF
ITS MOTION TO DISMISS

Federal jurisdiction is allegedly based upon liability under the Fair Debt
Collection Practices Act, 15 USC § 1692 et seq. (FDCPA) and the Fair Credit
Reporting Act, 15 USC § 1681 et seq. (FCRA). The State Claims are pendant on
Federal Jurisdiction.

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Introduction

A claim for violation of the FDCPA must be commenced within one year from the date on which the violation occurs. 15 USC § 1692k (d).

The action was commenced more than one year after the violation occurred. As a result, it is untimely, and there is no federal jurisdiction.

Plaintiff's claim under the Fair Credit Reporting Act, 15 USC § 1681 et seq. (FCRA) fails to state a claim for relief because it fails to allege that FirstSource reported the matter to any credit reporting agency.

Plaintiff's claim under the Telephone Consumer Protection Act, 47 USC § 227 et seq. (TCPA) fails for lack of subject matter jurisdiction.

Plaintiff's claim under the Washington Consumer Protection Act, RCW 19.86 et seq. (WCPA) fails because it fails to state a claim for relief because it fails to allege recoverable damages under the WCPA, and there is not subject matter jurisdiction in Federal Court without a Federal Claim against FirstSource.

Plaintiff's claim under the Right of Privacy Act, RCW 9.73.030 (Privacy Act) fails because it fails to state a claim for relief, and there is not subject matter jurisdiction in Federal Court without a Federal Claim against FirstSource.

As a result, plaintiff's complaint against FirstSource must be dismissed.

Background

An unfiled State Court complaint was delivered to FirstSource on August

11, 2011 by Certified Mail on FirstSource's Washington registered agent.

On August 17, 2011, FirstSource demanded in writing to Plaintiff that the Complaint be filed in State Superior Court. The Complaint was not filed by Plaintiff. As a result, the delivery to FirstSource, even if it was served, was void.¹

On September 8, 2011, Collectcorp Corporation and Phillips & Cohen Associates, Ltd. removed the same Superior Court complaint to Federal Court.

On September 19, 2011, FirstSource waived service [ECF No. 16].

As a result, this action was commenced against FirstSource no earlier than the date of removal (September 8, 2011) for statute of limitations purposes.

Pleaded Facts against FirstSource

The only allegation in the complaint of any action by defendant FirstSource were as follows:

1. FirstSource sent a letter dated February 3, 2010, and received by Plaintiff on February 8, 2010, attempting to collect a debt for Barclays. [ECF No. 1-1, p. 5, ¶ 16].

2. Plaintiff disputed in writing to FirstSource by letter dated February 21, 2010, and received by FirstSource February 25, 2010. [ECF No. 1-1, p. 6, ¶ 17].

¹ Washington Superior Court CR 3.

3. Plaintiff wrote FirstSource in a letter dated March 27, 2010, and received by FirstSource March 30, 2010. [ECF No. 1-1, p. 6, ¶ 18].

4. Plaintiff wrote FirstSource in a letter dated April 3, 2010, and received by FirstSource April 6, 2010. [ECF No. 1-1, p. 6, ¶ 19].

5. FirstSource called Plaintiff's private cell phone on April 30, 2010, May 5, 2010 and May 11, 2010. [ECF No. 1-1, p. 10, ¶ 52a].

6. FirstSource transferred the account to Collectorp. [ECF No. 1-1, p. 6, ¶ 20]. This transfer was prior to June 2, 2010. [ECF No. 1-1, p. 6, ¶ 21].

Legal Standard

A motion to dismiss for failure to state a claim pursuant to *FRCP 12(b)(6)* tests the legal sufficiency of the claims in the Plaintiff's Complaint. The review is limited to the Complaint, and all allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. *Cassettari v. Nevada County, Cal.*, 824 F.2d 735, 737 (9th Cir.1987).

“To survive a motion to dismiss, a Complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1940, 173 L.Ed.2d 868, 874 (2009).

1 A plaintiff's factual allegations must raise a right to relief "above the
 2 speculative level." See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955,
 3 1964-65 (2007); 5 C. Wright and A. Miller, *Federal Practice and Procedure* §
 4 1216, pp. 235-236 (3d ed. 2004) ("The pleading must contain something
 5 more...than...a statement of facts that merely creates a suspicion of a legally
 6 cognizable right of action").

7 It is a plaintiff's obligation to provide the "grounds" of his entitlement to
 8 relief which requires more than labels and conclusions. *Id.*

9 A Complaint does not suffice "if it offers naked assertions devoid of further
 10 factual enhancement." *Ashcroft v. Iqbal*, 129 S. Ct. at 1949, 173 L.Ed.2d at 883-
 11 884. "Where a Complaint pleads facts that are 'merely consistent with a
 12 defendant's liability', it 'stops short of the line between possibility and plausibility
 13 of entitlement to relief.' It demands more than an unadorned, the defendant
 14 unlawfully harmed me accusation." *Id.*

15 **FDCPA Statute of Limitations – Count One**

16 Actions to enforce liability under the FDCPA must be brought "within one
 17 year from the date of which the violation occurs." 15 USC § 1692k(d).

18 The latest alleged violation by FirstSource of violation of the FDCPA was
 19 May 11, 2010. This action was commenced by the removal in September 2011.

20 As a result, Plaintiff's claims against FirstSource were commenced after the

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1 statute of limitations expired, and the FDCPA claim against FirstSource must be
2 dismissed.

3 **FCRA Failure to State a Claim – Count 2**

4 There are no allegations of any violation of the FCRA by FirstSource. [ECF
5 No. 1-1, p. 17, ¶ 70-83.

6 As a result, any claim against FirstSource for violation of the FCRA must be
7 dismissed.

8 **TCPA Failure to State a Claim and Jurisdiction – Count 3**

9 State Courts have exclusive jurisdiction over a cause of action under the
10 TCPA. *Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000).

11 Since the Federal claims fail, jurisdiction under the TCPA against
12 FirstSource is pendant.

13 The Court should not accept jurisdiction against FirstSource for the TCPA
14 claim as the claims against the other defendants are not inter-related. Each call by
15 each agency is a separate issue in and of itself.

16 The Court should not confuse the fact finder with the claims against
17 FirstSource when jurisdiction vests in the State Court on TCPA claims.

18 The TCPA claim should be dismissed based on the dismissal of the Federal
19 claims.

20 Further, although there are conclusions in the complaint that the calls to the

1 cell phone were by automatic devices by FirstSource, there is no specific allegation
 2 that the calls by FirstSource to the cell phones were done with an automatic device
 3 as required to prove a violation of the TCPA.

4 The TCPA makes it “unlawful for any person ... to make any call (*other*
 5 *than a call* made for emergency purpose or *made with the prior express consent*
 6 *of the called party*) using any automatic telephone dialing system or an artificial or
 7 prerecorded voice ... to any telephone number assigned to a paging service, [or]
 8 *cellular phone service* ...” 47 USC § 227 (b) (1) (A) (iii) (emphasis added). The
 9 House Report on the TCPA emphasized the importance of consent: “[P]ersons
 10 who knowingly release their phone numbers have in effect given their invitation or
 11 permission to be called at the number which they have given, absent instructions to
 12 the contrary.” H.R. Rep. No. 102-317, at 13. After passage of the TCPA, the FCC
 13 further elaborated on “consent.” (The FCC has authority to “prescribe regulations
 14 to implement the requirements of this subsection.” 47 USC § 227 (b) (2).) The
 15 FCC declared that the TCPA’s exception for calls made with the “prior express
 16 consent” of the called party encompasses “autodialed and prerecorded message
 17 calls to wireless numbers provided by the called party in connection with an
 18 existing debt.” FCC Declaratory Ruling, FCC 07-232, 564 (Dec. 28, 2007).
 19 Because the FCC’s declaratory ruling is a “final order” for purposes of the Hobbs
 20 Act, 28 USC § 2342, it is not subject to district court review and is binding here.

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1 *See Leckler v. Cashcall, inc.*, 2008 US Dist. LEXIS 97439, at *7 (N.D.Cal. 2008)
 2 (deferring to FCC declaratory ruling) (citing *US West Commc'ns, Inc. v.*
 3 *Hamilton*, 224 F.3d 1049, 1054 (9th Cir. 2000)).

4 Thus, under the TCPA, if the FirstSource debtor provides a cell phone
 5 number to FirstSource as a contact number, FirstSource may use an autodialer to
 6 call that number regarding a past due account without violating the TCPA.

7 Plaintiff does not plead facts that would create a violation of the TCPA by
 8 calling a cell phone by a debt collector.

9 Plaintiff pleads calls to Plaintiff's cell phone by FirstSource. [ECF No. 1-1,
 10 p. 10, ¶ 52a]. However, this alone does not create liability.

11 As a result, the claims under the TCPA fail to state a claim for relief.

12 **Privacy Act – Count 4**

13 Since the Federal claims fail, jurisdiction under the Privacy Act against
 14 FirstSource is pendant.

15 The Court should not accept jurisdiction against FirstSource for the Privacy
 16 Act claim as the claims against the other defendants are not inter-related. Each call
 17 by each agency is a separate issue in and of itself.

18 The Court should not confuse the fact finder with the claims against
 19 FirstSource when jurisdiction vests in the State Court on Privacy Act claims.

20 The Privacy Act claim should be dismissed based on the dismissal of the

1 Federal claims.

2 **WASHINGTON COLLECTION AGENCY ACT AND WASHINGTON**
3 **CONSUMER PROTECTION ACT CLAIMS**

4 Plaintiff has failed to state a claim under the Washington Collection Agency
5 Act (WCAA), or the Washington Consumer Protection Act (WCPA) because
6 Plaintiff has failed to plead actual damages.

7 To establish a claim under the WCPA, plaintiffs must prove five elements:

- 8 (1) An unfair or deceptive act or practice;
9 (2) Occurring in trade or commerce;
10 (3) Public Interest Impact;
11 (4) Injury to Plaintiffs' business or property; and
12 (5) Causation. *First State Insurance Company v. Kemper National*

13 *Insurance Company*, 94 Wash.App. 602, 608-9, 971 P.2d 953 (1999).

14 Whether a particular action gives rise to a WCPA violation is a question of
15 law. *First State Insurance Company v. Kemper National Insurance Company*, 94
16 Wash.App. at 609.

17 WCPA does not authorize relief if a plaintiff cannot prove damages. *Roger E.*
18 *Girard et al v. Michael H. Myers et al*, 39 Wash.App. 577, 694 P.2d 678 (1985).

19 Damages for emotional distress are not recoverable for a violation of the
20 WCPA. The plaintiff who is successful on a WCPA claim is entitled to actual

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1 damages and to the attorney fees and costs related to the WCPA claim. Damages for
2 emotional distress are generally limited to claims for intentional torts. *Johnson v.*
3 *Cash Store*, 116 Wash.App. 833, 68 P.3d 1099 (2003).

4 Even if FirstSource committed an unfair or deceptive practice as to Plaintiff,
5 Plaintiff is required to plead and prove actual damages caused by FirstSource to
6 sustain a claim under either of those statutes.

7 Plaintiff pleads no actual damages incurred by Plaintiff as to FirstSource's
8 alleged conduct. As a result, Plaintiff does not state a claim for relief.

9 **Conclusion**

10 Plaintiff's complaint must be dismissed because it was commenced outside
11 of the statute of limitations, and because it is impermissible claim-splitting.

12 Plaintiff can prove no set of facts in support of his claim which would entitle
13 him to relief.

14 As a result, defendant FirstSource's motion to dismiss should be allowed.

15 Dated: November 7, 2011.

16 s/ Jeffrey I. Hasson

17 Jeffrey I. Hasson, WSBA#23741

18 Phone: (503) 255-5352

19 Attorney for FirstSource

Certificate of Service

I hereby certify that on November 7, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Pamela M. Andrews, Stephen A. Bernheim, and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: Carl H. Plumb, 4902 Richey Rd., Yakima, WA 98908.

s/ Jeffrey I. Hasson

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